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No. 96 - 1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EDWARD S. COHEN,

Petitioner,

v.

HILDA DE LA CRUZ; NELFO C. JIMENEZ; MARIA MORALES; GLORIA SANDOVAL; HECTOR SANTIAGO; SANTIA SANTOS; ELBA SARAVIA; ELVIA SIGUENZIA; ENILDA TIRADO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

HOWARD J. BASHMAN
JOHN FRANCIS GOUGH
MONTGOMERY, MCCRACKEN WALKER & RHOADS, LLP
123 South Broad Street
Philadelphia, PA 19109
(215) 772-1500

DONALD B. AYER
(Counsel of Record)
JAMES E. ANKLAM
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

Section 727 of the Bankruptcy Code states that, where its specified conditions are met, the bankruptcy court "shall grant" individual debtors a discharge of "all debts that arose" prior to the relevant record date, "except as provided in Section 523." In his opening brief, petitioner argued that the plain language of 11 U.S.C. § 523(a)(2) creates an exception from discharge that extends only to the value of money, property, services or credit that is actually obtained by fraud. Pet. Br. at 11-20. Petitioner also showed that this straightforward meaning is wholly compatible with the other provisions of § 523(a), and especially with §§ 523(a)(4) and (a)(6), which also reach debts resulting from fraudulent conduct in certain instances. *Id.* at 20-25.

Finally, petitioner pointed out that any reading of § 523(a)(2) to result in nondischarge of debts beyond those indicated by its clear language runs contrary to the established principle of narrow construction for such provisions, which is based on the fresh start policy at the heart of the bankruptcy laws as applied to individual debtors. *Id.* at 25-32. In particular, petitioner noted that the court below failed to appreciate either the real life context of consumer bankruptcies, which constitute the vast majority of cases affected by the construction of § 523(a)(2), or Congress's clearly expressed concerns that consumer debtors be protected against overreaching by consumer credit companies, which represent their primary creditors. *Id.* at 29-32.

Respondents and their *amicus*, the Solicitor General, respond to these arguments with tortured and inconsistent alternative interpretations of the statutory language, refutation of arguments never advanced by petitioner about the relationship between (a)(2) and other provisions of § 523(a), and almost total neglect of Congress's concern to protect consumer debtors against overreaching institutional creditors. Ultimately, respondents and their *amicus* rely on two counter arguments — the assertion that enforcement of the obvious meaning of the words of (a)(2) would reward dishonest debtors in a way inconsistent with bankruptcy policy, and the absence of legislative history indicating an intended meaning of the section in accordance with its amended language. These arguments are unpersuasive for reasons that will be discussed below.

1. A non-lawyer of reasonable intelligence has no difficulty understanding the meaning of the words in issue, which except from discharge "debts for money" (or services, property, or extension of credit) "to the extent obtained by" fraud.[1] That meaning is not made more mysterious by combining, as respondents and their *amicus* urge, several definitions and substituting for "debt" the words "liability on a claim." SG Br. at 11, Resp. Br. at 7. The exception to discharge is still limited to "liability on a claim for money" (or property, services, or extension of credit) *to the extent it was obtained by fraud*.

Respondents and their *amicus* disagree on how the remaining words of (a)(2) are to be understood. Respondents argue that the "to the extent obtained" language introduced in 1984 modifies only the words "refinancing of credit," and does not apply to "money, property, [or] services," which immediately precede them. Resp. Br. at 8, 17-18. If this argument were accepted, "money, property, [and] services," would be left unmodified in any way and thus would be made nondischargeable in all cases, absent the heroic implication of extensive language imposing some other limitation on those words. Obviously, if all "debts for money, property, [or] services" were made nondischargeable, little would be left of the individual bankruptcy process as we know it. Certainly respondents have failed to offer a reasonable alternative reading of the statutory language.

The Solicitor General, for his part, agrees with petitioner that "to the extent obtained" must modify all of its antecedents —

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[1] As all parties recognize, Resp. Br. at 8, SG Br. at 16, no party to this case is arguing that the words "to the extent obtained" modify the word "debt." However, because, in usual usage, a "debt for" something is a debt for the value of the thing, as used in (a)(2) the amount of the debt is expressly limited to the amount of the money (or property or services) obtained by fraud. Accordingly, in addition to exemplary damage awards, (a)(2) does not reach consequential damages of fraudulent conduct. SG Br. at 21. Like punitive awards, such amounts are rendered nondischargeable under (a)(6) if they arise from conduct that is willful and malicious in nature. *See* pages 6-7, *infra*.

money, property, services, or extension of credit. SG Br. at 17. His argument therefore depends on the essential premise that a "debt for money . . . to the extent obtained by" fraud may actually be much greater than the amount of money obtained by fraud. Specifically, he claims, it reaches any award "arising from" the act of obtaining the money by fraud. He reaches this result by way of a quixotic quest for a single meaning of the words "debt for" as they appear throughout not only § 523(a), but the entire Bankruptcy Code. After exploring various dictionary definitions of the word "for," SG Br. at 13-14 nn. 5, 6, the Solicitor General settles on a definition that petitioner has been unable to find in any dictionary. *See* VI *Oxford English Dictionary* 23-26 (2d ed. 1989); *Webster's Third New International Dictionary* 886 (1986). He concludes that "each time the phrase 'debt for' appears in the Code, it means liability on a claim 'arising from.'" SG Br. at 14 n.6. Thereafter he asserts, without any reference to petitioner's brief, that petitioner does not dispute this construction. SG Br. at 16.

Petitioner disagrees not only with the Solicitor's conclusion, but with the essential premise that "debt for" should have exactly the same meaning when its object is a thing of value — *i.e.*, money, property, or services, as in (a)(2) — as when its object is a stated act of misconduct — *i.e.*, fraud while acting as a fiduciary, as in (a)(4); willful and malicious injury, as in (a)(6); or death or personal injury caused by drunk driving, as in (a)(9). It is perfectly reasonable — though not logically necessary — to conclude, as in fact the courts have done, that a "liability on a claim for willful and malicious injury" encompasses the entire claim brought on the basis of the willful and malicious injury — including any consequential or punitive damages awarded.[2] In

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[2] This conclusion can be reached under a construction of "for" to mean "because of, on account of," or "as regards, in respect to," if the words of the definitions are read broadly. *Webster's Third New International Dictionary* 886 (definitions 8a, 10a). It is also possible to reach the contrary conclusion if either of these definitions is read narrowly, or if the alternative definition, "to the amount of or extent of," is used

contrast, where the object of "debt for" is a thing of value rather than a misdeed — as in a "debt for money, property, or services" — the debt encompassed is unmistakably confined to the thing referenced. While a claim for a specified wrongful act may give rise to various remedies for that wrong, which may include punitive damages, a claim for a particular amount of money or property — the amount obtained by fraud — is just that.[3]

Even if the Solicitor General's goal of finding a single definition of "debt for" to apply throughout the Bankruptcy Code (or even § 523(a)) were counted worthy, the definition he settles on — "debt arising from" — does not remotely fill the bill. Debts — or claims — do not "arise from" money or property, but rather from acts — of tortious injury, contractual commitment, or whatever. Thus the government's quest for a one-size-fits-all definition of the word "for" leaves a sentence that makes no sense. The only reason to adopt such a tortured construction is to avoid the meaning of the words as written.[4] Only by rewriting the sentence to make the debt one for fraudulent conduct rather than for a particular thing, and thus changing entirely its stated meaning, can the government's forced construction be fit into an

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instead. *Id.* (definition 4).

[3] All three of the definitions of "for" discussed in the preceding footnote make reasonably good sense when substituted in the context of § 523(a)(2), and each points to the conclusion that the claim is limited to the value of the thing referenced.

[4] It is not necessary to invent a definition that appears nowhere in any dictionary, or to twist the English language into unrecognizable forms, in order to arrive at a definition of the word "for" that can consistently be applied throughout § 523(a). Were there any point in seeking such blindered consistency in the face of distinguishable uses of language, any of the definitions referenced in footnote 2 would adequately serve the purpose.

understandable English sentence.[5]

2. As petitioner argued in his opening brief, such a wholesale judicial rewriting of the language adopted by Congress is not required by any untoward consequences that follow from applying the statute as written.[6] *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 117 S.Ct. 796, 804 (1997). In particular, the various provisions of § 523(a) fit together in a complementary way when (a)(2) is given its natural meaning, notwithstanding several points made by respondent and the Solicitor General.[7]

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[5] The government seeks to support its construction of the section by comparison with § 523(a)(7), which renders nondischargeable a debt "to the extent such debt is for a fine, penalty, or forfeiture payable to a governmental unit" and is not compensation for actual pecuniary loss. SG Br. at 17-18. The Solicitor General seems to believe that the construction used in (a)(7) — "debt to the extent such debt is for a fine, . . . " — is markedly clearer than the (a)(2) construction — "debt for money . . . to the extent obtained" by fraud. Petitioner does not share this view, and rather notes that in both instances the "to the extent" language is used to define the outer limit of the amount that will be deemed nondischargeable. Pet. Br. at 24.

The Solicitor General also suggests that the language in (a)(7) is somehow important because it distinguishes between punitive and compensatory amounts in a clear manner, as might have been followed in (a)(2) if "petitioner's contention [were correct] that Section 523(a)(2) draws a similar distinction." SG Br. at 20. However, petitioner does not contend that the line drawn by (a)(2) is between compensatory and punitive damages. It is rather between debts for money or other things of value obtained by fraud, and all other debts. Pet. Br. at 13.

[6] Contrary to respondent's assertion, Resp. Br. at 9, petitioner did not argue that "his proposed construction . . . is the only logical method to harmonize all of the exceptions to discharge." The piecemeal enactment of individual discharge provisions over many years, in response to particular concerns, makes any such claim dubious.

[7] Petitioner noted that the construction of (a)(2) apparent from its words avoids rendering superfluous the language of (a)(4) dealing with "fraud while acting in a fiduciary capacity," which has been read to except

Most importantly, when (a)(2) is construed as rendering nondischargeable only the value of money, property, services, or credit actually obtained by fraud, it works together with (a)(6), addressing "willful and malicious injuries," to treat the universe of injuries resulting from fraud in a coherent and sensible way.[8] The precise definition and breadth of the (a)(6) provision is presently pending before the Court in *Kawaauhau v. Geiger* (No. 97-115) (to be argued Jan. 21, 1998). But it seems clear that the willful and malicious standard of (a)(6) will be held to demand some measure of actual knowledge and/or intentionality beyond the standard of recklessness that has been found sufficient to establish actual fraud under (a)(2). *See* SG Br. at 25 n.17.

Accordingly, under petitioner's proposed construction, creditors who prove reckless fraud will have the value of the money or other property obtained from them by that fraud rendered nondischargeable. Creditors who can go further and show the higher standard of knowledge or intention required for willful and malicious injury — whatever the Court in *Geiger* holds that to be — will further have penalties and other remedies preserved against discharge. Thus, it is only cases such as this one, involving fraud as a result of reckless but not willful and malicious conduct, that will be affected by the decision in this case.

When this treatment in the Bankruptcy Code of debts for injuries resulting from fraud is placed alongside its treatment of debts for other tortious injuries, an appropriate symmetry becomes apparent. After all, there is no general nondischarge provision for debts owing for tortious injuries arising from negligent — or even reckless — conduct. In a few cases triggered by special concerns, *e.g.*, § 523(a)(9) (injuries or death from drunk driving); § 523(a)(12) (malicious or *reckless* failure to maintain bank regulatory capital requirements), Congress rendered nondischargeable amounts awarded for narrowly defined categories of reckless conduct. In general, though, only where the tortious conduct rises to the level of willful and malicious injury under (a)(6), are debts for tortious injuries rendered nondischargeable. Reading (a)(2) in accordance with its terms thus treats the issue of dischargeability of exemplary or consequential damages resulting from tortious injuries, including fraud, in a consistent manner. It respects the directive of (a)(2) to preserve against discharge only the amounts actually obtained by fraud that is merely reckless, while rendering punitive damages and consequential damages nondischargeable under (a)(6) upon a showing of a willful and malicious conduct.

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from discharge punitive damages and other related awards going beyond the value actually acquired by fraud. Pet. Br. at 22; *In re Bugna*, 33 F.2d 1054, 1059 (9th Cir. 1994). The Solicitor General argues no superfluity will result from reading (a)(2) to except all of these other types of awards, because (a)(4) by its terms also reaches "defalcations," and, he claims, the "fraud" referenced in (a)(4) includes constructive fraud, which is not encompassed in (a)(2). SG Br. at 24.

As to the former point, the Solicitor General responds to an argument that was not made. Clearly, an inappropriately expansive reading of (a)(2) would not render superfluous all of (a)(4), which also reaches embezzlement and larceny, in addition to defalcations by a fiduciary. It would, however, render superfluous (a)(4)'s exception of debts "for fraud . . . while acting in a fiduciary capacity," which has existed in the bankruptcy law since 1898, since that conduct would already be covered by (a)(2), and both exceptions would reach punitive and compensatory damages. Contrary to the Solicitor's second assertion — for which he offers no authority — the reference to fraud in (a)(4) *does not* reach constructive fraud but, like the reference to fraud in (a)(2), applies only to actual fraud. *In re Tripp*, 189 B.R. 29, 35 (Bankr. N.D.N.Y. 1995); *In re McDaniel*, 181 B.R. 883, 886-87 (Bankr. S.D. Tex. 1994). *See* G. Singer, *Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy*, 71 Am. Bankr. L. J. 325, 368 (1997) (under (a)(4), the fraud must involve moral turpitude or intentional wrong; constructive fraud is insufficient).

[8] It is entirely natural to construe § 523(a)(2) in context with the (a)(6) provision for nondischarge of debts for willful and malicious injuries, since, between 1903 and 1978, the two provisions existed in almost identical form within one section of the statute. During that time, courts generally invoked the section without indicating whether they were relying on one provision or the other or both. *See* note 11, *infra*.

3. Into this discussion of the proper construction of § 523(a)(2), respondent and the Solicitor General inject the argument that construction of this section in accordance with its literal terms would offend the limitation of bankruptcy relief to the "honest but unfortunate debtor." Resp. Br. at 11; SG Br. at 7, 10. As respondent puts it, "[p]etitioner is not the 'honest but unfortunate debtor' entitled to a fresh start." Resp. Br. at 11. Even leaving aside the question of whether charging market rents as a result of reckless inattention to rent control requirements — the conduct at issue here — is really dishonesty in the usual sense of the term, this Court's references to the "honest but unfortunate debtor" have no bearing on the outcome of this case.

Taken literally — to deny all access to bankruptcy discharge and its fresh start to a person who has committed fraud against another — respondent's assertion is a gross distortion of the statements of this Court, and is obviously false. There was a time when the bankruptcy laws gave defrauded creditors the alternative remedy of preventing the discharge of all of the debtor's debts under § 14c(3) of the Bankruptcy Act, if the debtor had created a fraudulent debt with any creditor by a false statement in writing. However, that provision has long since been excised from the bankruptcy law.[9] The question in this case is thus not whether

[9] Initially, from 1903 until 1960, a creditor could prevent a debtor from obtaining any discharge for any and all debts if the debtor had made a materially false statement in writing to the creditor. Bankruptcy Act § 14c(3), 11 U.S.C. § 32c(3) (1959) (originally § 14b(3), renumbered in 1938 as § 14c(3)). In 1960, Congress's concern that unscrupulous creditors were using the threat of invoking the § 14c(3) bar to discharge in order to force consumer debtors to agree to reaffirm their consumer debts, S. Rep. No. 86-1688 (1960), *reprinted in* 1960 U.S.C.C.A.N. 2954-56 (describing practices), led it to narrow § 14c(3) so that a creditor could not use § 14c(3) if the debtor's allegedly fraudulent debt arose in a consumer transaction. 11 U.S.C. § 32c(3) (1961). Thereafter, in the 1970s, the Commission on the Bankruptcy Laws of the United States found that the risk of coercion by creditors from even the narrowed version of § 14c(3) was too great and recommended the abolition of § 14c(3), which was eliminated in the Code as enacted.

petitioner is entitled to resort to the bankruptcy process and avail himself of the fresh start that it provides; it is only the construction of a single statutory provision in determining the breadth of that discharge.

If, on the other hand, the "honest but unfortunate debtor" is invoked as an interpretive tool in determining the dischargeability of exemplary (or consequential) damages awarded for reckless, unintentional fraudulent conduct under the specific language of § 523(a)(2), it is too blunt an instrument to be of assistance. The venerable notion that Congress enacted the bankruptcy laws so that "the honest citizen may be relieved of the burden of hopeless insolvency," *Neal v. Clark*, 95 U.S. 704, 709 (1877), simply does not inform us of the proper construction of § 523(a)(2) and its relationship to the willful and malicious injury exception of (a)(6).

Concededly, as the Court has recently repeated, the Code [like the Act] "limits the opportunity *for a completely unencumbered* new beginning to the 'honest but unfortunate debtor.'" *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (emphasis added)). But in this case it is obvious that petitioner will not have an unencumbered new beginning regardless of how the Court rules, since the rental overcharges plainly will not be discharged. And determining which encumbrances are appropriate based on particular types and degrees of misbehavior is a matter for solemn statutory interpretation, not for sloganeering.

Unless the Court is prepared to imply a maxim of construction resolving statutory ambiguities relating to fraudulent conduct against the party who commits fraud — of either the reckless or malicious sort — it is difficult to see any relevance of the "honest but unfortunate debtor" language to this case. Such a step would be a remarkable departure from the Court's holding in *Gleason v.*

Report of the Commission on the Bankruptcy Laws of the United States, H. Doc. No. 93-137, pt. 1, at 175 (1973) (hereinafter "Commission Report").

Thaw, 236 U.S. 558, 562 (1915), which narrowly construed the precursor of § 523(a)(2) in the face of clear, intentional fraud, reasoning that the purposes of the bankruptcy law require that "exceptions to the operation of a discharge . . . should be confined to those plainly expressed." Indeed, even if the Court were to make such an about face, petitioner submits that the maxim would have no effect here, since the statutory language of (a)(2) is not ambiguous.

4. The other general argument trotted out by respondents and the Solicitor General in reply to the specific language and structure of the relevant provisions is that Congress will not be found to have made significant departures from past bankruptcy practice in the absence of a clear indication of an intent to do so, and there is no legislative history discussing the amendment of § 523(a)(2) in 1984. Resp. Br. at 16; SG Br. at 8, 26, 28. There are several terminal flaws in this attempt to prevail based upon the absence of legislative history.

First, as respondent concedes, "this principle will not overcome specific language in a statute." Resp. Br. at 15. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 563 (1990). The language of (a)(2) is quite clear in defining the limit of the discharge exception. The divergent and wholly implausible alternative constructions offered by respondent and the Solicitor General confirm not only that the intended meaning of the words is clear, but that the words as written cannot reasonably be understood in a different way. Certainly no legislative history is required to confirm the meaning of such a provision, even if it amounted to a substantial and important departure from past practice. "[W]here the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup v. Timm*, 502 U.S. 410, 419-420 (1992). *See also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (where the language of a statute is unambiguous, the judicial inquiry into the meaning of the statute is complete).

Here also, though, the 1984 change in language from "debt for obtaining money, . . . by" fraud, to "debt for money, . . . to the

extent obtained by" fraud did not effect the sort of "major change" from prior practice, *Dewsnup*, 502 U.S. at 419, that might be expected to draw commentary in the legislative history. While the present provision is clear on its face in rendering nondischargeable only the value of property actually "obtained by" fraud, the "for obtaining money, . . ." by fraud language of the statute as it existed from 1903 until 1984 is ambiguous and the cases construing it did not clarify the ambiguity. Accordingly, the change in 1984 was from a provision whose meaning was at best murky, to one whose meaning is clear. This is precisely the sort of clarification that Congress often enacts without specific explanation.

While there are a number of identifiable explanations for the murkiness of the case law interpreting the pre-1978 version of (a)(2) containing the "for obtaining money" language,[10] it

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[10] One important reason is the relatively small number of cases presenting creditor claims for punitive damages which arose in the bankruptcy courts prior to the enactment of the Bankruptcy Code. This was due in part to the limited significance of punitive damage awards prior to the rapid rise in their number and size during the late 1970s and early 1980s. *See* M. Peterson, S. Sarma, M. Shanley, *Punitive Damages: Empirical Findings* 9-19 (RAND: The Institute for Civil Justice 1987) (reporting the number, types of cases and punitive damage awards in Cook County, Illinois and San Francisco during that time period); Brief *Amicus Curiae* The Association for California Tort Reform, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (No. 89-1279) (discussing and citing authorities relating to the increase in the incidence and size of punitive damage awards).

Additionally, the number of claims for punitive damage awards entertained in individual bankruptcy actions was reduced by a line of authority mistakenly derived from this Court's decision in *Simonson v. Granquist*, 369 U.S. 38, 42 (1962) (holding, under § 57j of Bankruptcy Act, 11 U.S.C. § 93j (1962) (repealed 1978), that federal tax penalties were not to be pursued in bankruptcy), to the effect that individual punitive damage awards were not provable debts. *In re Beard*, 5 B.C.D. 680, 682-83 (Bankr. M.D. Tenn. 1979). *Contra United States*

resulted primarily from the fact that this language co-existed *within a single section* with the exception for willful and malicious acts.[11] After the early 1970s there was well-recognized authority that the latter exception did render punitive amounts nondischargeable. *Coen v. Zick*, 458 F.2d 326, 329-330 (9th Cir. 1972) (dealing with nonfraudulent, willful and malicious eviction of tenant).

While the pre-1984 "for obtaining by" fraud language is susceptible to interpretation as excepting from discharge amounts awarded beyond the amounts actually obtained by fraud, it also can be read as limited to the amounts actually obtained.[12] In

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v. RePass, 688 F.2d 154, 157 (2d Cir. 1982). *See In re Cheatham*, 44 B.R. 4, 9 (Bankr. N.D. Ala. 1984).

[11] Between 1903 and 1970, the (a)(2) provision excepted from discharge such provable debts "as are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another." *See* ch. 487, 32 Stat. 798 (1903); Pub. L. No. 86-621, 74 Stat. 408 (1960). In 1970, a separate exception was created in subsection (a)(8) for "liabilities for willful and malicious injuries to the person or property of another . . ." and the (a)(2) provision excepted from discharge such provable debts "as are liabilities for obtaining money or property by false pretenses or false representations, . . . or for willful and malicious conversion of the property of another; . . ." 11 U.S.C § 35(a)(2) (excluding language relating to extensions of credit). This language persisted until 1978, when all reference to "willful and malicious" conduct was removed from § 523(a)(2) and confined to § 523(a)(6).

[12] Two of the definitions of "for" discussed in notes 2, 3, *supra*, ("because of, on account of," "as regards, in respect to"), when used in conjunction with the pre-1984 "for obtaining by" fraud language, do not clearly resolve the question of whether the exception is limited to the amount actually obtained by fraud, or rather encompasses all liabilities resulting from the claim brought upon that conduct. The third definition discussed, "to the extent of or amount of," fits only awkwardly into the language as it then existed, but if found applicable would clearly limit the exception to the amount obtained.

applying a single section that lumped this language together with the exception "for willful and malicious injury" or "conversion," to facts that almost always met both tests, the courts often found punitive awards nondischargeable without explicating or necessarily defining by implication the limits of the "for obtaining by" fraud exception. Many of the pre-Code cases relied on by respondents and the Solicitor General rely explicitly on *Coen*. No case contains an explicit statement that the "debts for obtaining by" fraud language, read alone, reaches punitive amounts.[13]

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[13] Among the pre-Code cases, only one clearly holds that the "for obtaining by" fraud language of then-§ 17(a)(2) excepts from discharge punitive awards based on fraudulent conduct. *In re Houtman*, 568 F.2d 651 (9th Cir. 1978) (2-1, per curiam). There, damages, including punitives, based on reckless fraud in connection with a real estate transaction, were found nondischargeable under (a)(2). Since the central issue on appeal was whether reckless, unintentional fraud would suffice under (a)(2), the court cannot have relied upon the "willful and malicious conversion" prong of the section as the basis to except the punitive damage amounts from discharge. However, the court never discussed whether the "for obtaining by" fraud language reached punitive damages, which argument appears not to have been raised by the debtor.

Other pre-Code decisions cited by the Solicitor General and alleged to be "to the same effect," SG Br. at 15 and n.7, clearly are not. *In re Willis*, 2 B.R. 566, 568 (Bankr. M.D. Ga. 1980), is a § 17a(8) case (car accident), which relied explicitly on *Coen* and in which fraud was not an issue. *In re Webster*, 1 B.R. 61, 64 (Bankr. E.D. Va. 1979), also expressly relied on *Coen* to hold nondischargeable amounts awarded not for fraud, but for willful and malicious interference with contractual rights. The *Webster* court's erroneous citation of § 17a(2) apparently resulted from its failure to note that the willful and malicious injury provision had been moved to then-§ 17a(8) in 1970. *United States v. McQuatters*, 370 F.Supp. 1286, 1288 (W.D. Tex. 1973), found nondischargeable under § 17a(2) a double damage award under the False Claims Act, based on use of "knowingly falsified invoices . . . to obtain money" from the United States. Such conduct clearly meets the willful and malicious injury standard then included in § 17a(2), and the court

The heavy reliance placed by both respondents and the Solicitor General on this Court's decision in *Brown v. Felsen*, 442 U.S. 127, 138 (1979), to establish a clear contrary meaning of the § 17a(2) language, is very telling in this respect. That case presented the issue of whether a bankruptcy court may consider extrinsic evidence in determining whether a debt previously reduced to judgment in a state court is subject to exception to discharge under §§ 17a(2) and 17a(4) of the pre-1978 Act, and resolved that issue in the affirmative. In lumping together its discussion of the "deceit, fraud, and malicious conversion" alleged by petitioner, this Court, like most other courts addressing the collective provisions of § 17a(2), did not treat separately the "for obtaining" portion of the section. Of course, no question of the dischargeability of punitive damages was in any way presented in the case.

Nor do the decisions construing the Code, which at first perpetuated the pre-Code, "for obtaining by" fraud language, while removing the "willful and malicious" language from (a)(2) and confining it exclusively to (a)(6), establish any clear construction different from the literal meaning of the current provision. Indeed, the clearest authority construing the 1978 language of § 523(a)(2) reads it consistently with petitioner's understanding of the present language of the section.[14] And the

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at no point discussed any of the language of that section. *Chernick v. United States*, 492 F.2d 1349, 1350 (7th Cir. 1974) is essentially similar to *McQuatters*. It involved a double damages award for submitting false financial statements, which conduct was most certainly willful and malicious in view of the prior criminal conviction that had been entered upon it. The court did not specifically state why it found the award nondischargeable.

[14] *In re Cheatham*, 44 B.R. at, 8-9, in a ruling under the 1978 language that carries out the plain meaning of the section as it is now written, held that a punitive damage award was *dischargeable* under § 523(a)(2), and recognized the historical lack of clarity that had surrounded the construction of that provision under the Act.

sole citation offered by respondent on this point is certainly not to the contrary. In *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474 (11th Cir. 1985), the court held only that where a debtor receives a loan through reckless falsehoods on loan papers submitted to a bank, the portion rendered nondischargeable under § 523(a)(2) includes the full amount of the loan and is not limited to the value of the collateral submitted to the bank. *Id.* at 1477. *Birmingham Trust* thus deals *only* with money *actually obtained by* fraud, and thus the decision is entirely consistent with the meaning of the current language.

Accordingly, under all the circumstances, it is not surprising that Congress would have made the change that it did, starting with its first attempt to do so in 1980 and persisting through actual enactment in 1984,[15] without addressing the issue in the

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The other cases cited in the Solicitor General's footnote 7 interpreting § 523(a)(2) under the Code are no more persuasive than his pre-Code decisions in establishing a clear construction of the "for obtaining by" fraud language that is contrary to the obvious meaning of the current provision. *In re Maxwell*, 51 B.R. 244, 246 (Bankr. S.D. Ind. 1983), as conceded in the Solicitor General's parenthetical, relied collectively upon §§ 523(a)(2), (a)(4), and (a)(6), to hold nondischargeable various awards, including punitive damages, for "fraud and willful and malicious injury," and thus indicated nothing specific about the meaning of (a)(2). In *In re Fellows*, 22 B.R. 40 (Bankr. E.D. Va. 1982), the court found nondischargeable compensatory and punitive awards for conduct that was clearly willful and malicious — the double selling of notes — without any discussion of language or reference more specific than "Section 523." *In re Carpenter*, 17 B.R. 563 (Bankr. E.D. Tenn. 1982), held nondischargeable an $8000 award for "willful and malicious representation and fraud" by a used car dealer in connection with negotiations to sell a car. Other than to cite the code section by number, the court did not discuss in any way the meaning of § 523(a)(2), and the result was clearly correct under (a)(6) in any event.

[15] Shortly after the enactment of the 1978 Code, Congress turned to consideration of "An Act to Correct Technical Errors, Clarify and Make Minor Substantive Changes to Public Law 95-598." The language at issue in this case appears to have been inserted by the House Judiciary

legislative history. Along with many other changes enacted at the same time, the revision would rightly have been viewed as a refinement of existing language that clarified the meaning of a potentially ambiguous provision.

Indeed, even if the prior meaning had been clear, as respondents contend, the change still would have had only marginal importance — in eliminating the nondischargeability exception for exemplary and consequential damages for reckless fraud. It would have affected just the limited universe of conduct falling within the narrow category of reckless fraud not rising to the level of willful and malicious conduct. "The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991).

5. Finally, all of these arguments and those advanced in opposition should be evaluated against the background reality that the Court's interpretation of § 523(a)(2) will have its primary relevance in the context of consumer bankruptcies. While the debt at issue in this case did not arise from a consumer credit transaction, the meaning of the statutory language which the Court will determine in this case applies equally in all cases of individual bankruptcy. Given that the vast majority of such bankruptcies presently arise from excessive consumer debt, through credit cards and other extensions of credit,[16] the decision should be made with that reality in mind.

Committee, H.R. Rep. No. 96-1195, 77 (1980), and thereafter the language reappeared without change in proposed legislation until its adoption in 1984. *E.g.*, S. 863, 97th Cong. 1st Sess. § 39(a)(1) (1981).

[16] *See* I Report of the National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* 82-86 (1997). Between 1977 and 1997, consumer debt increased nearly 700%. *Id.* at 84. Thus the issue with which Congress was significantly concerned in 1978, *see* pages 17-18 *infra*, has certainly not subsided in the interim.

Even more relevant is the fact that the situation of the consumer debtor was much on the mind of the Congresses that enacted the Code in 1978 and the amendments to it in 1984. The present language was enacted after a period of several decades during which the total number of bankruptcies filed each year increased many fold, almost entirely as a result of an explosion in filings by individual consumers.[17] This reality was much discussed in the deliberations leading up to the enactment of the Bankruptcy Code in 1978.[18] Congress clearly concluded that under prior law, the bankruptcy process had provided inadequate relief for consumer debtors. H.R. Rep. No. 95-595, at 4 *reprinted in* 1978 U.S.C.C.A.N. 5966. In the Code, Congress acted concretely in a number of ways to provide consumer debtors with a "less encumbered 'fresh start'" after bankruptcy. S. Rep. No. 95-1106, at 1 (1978).

In particular, Congress broadened the definition of "claim" to authorize the bankruptcy court to address completely the debtor's legal obligations. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101(4), 92 Stat. 2550; H.R. Rep. No. 95-595, at 309, *reprinted in* 1978 U.S.C.C.A.N. 6266; S. Rep. No. 95-989, at 21-22, 1978 U.S.C.C.A.N. 5807-08. Likewise, it abolished the provability requirement for debts to be considered in bankruptcy. *See* 11 U.S.C. § 727 (1979); *see* Pub. L. No. 95-598, § 727, 92 Stat. 2609; H.R. Rep. No. 95-595, at 180, *reprinted in* 1978 U.S.C.C.A.N. 6141. (Previously, creditors with non-provable

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[17] Total bankruptcy filings increased from 8566 in 1946 to 191,729 in 1967. Commission Report, pt. 1, at 33. By the late 1970s, consumer bankruptcies accounted for nearly 90% of the 250,000 bankruptcy cases filed each year. 123 Cong. Rec. 35444 (1977).

[18] The legislative history indicates a perception that a great expansion in the availability of consumer credit since World War II was substantially responsible for the major jump in the number of consumers "overburdened . . . with debt." H.R. Rep. No. 95-595, at 116, *reprinted in* 1978 U.S.C.C.A.N. 6076-77. The greatest portion of these consumer debts were understood to be "installment debts held by consumer finance companies and banks." Commission Report, pt. 1, at 44.

debts did not share in the bankrupt's estate, and these non-provable claims survived the bankruptcy discharge.) Both of these steps were intended to permit a more complete adjudication in the bankruptcy court, further reducing the debts surviving discharge. *Id.*

Congress also took several steps to protect consumer debtors against harassment and other pressures by creditors, which it perceived as a major threat going to the heart of the bankruptcy process. H.R. Rep. No. 95-595, at 125, *reprinted in* 1978 U.S.C.C.A.N. 6086. In particular, Congress eliminated § 14c(3), *see* Pub. L. No. 95-598, § 727, 92 Stat. 2609, which had permitted complete denial of a discharge to a business debtor who "incurred debt by use of a false financial statement." H.R. Rep. No. 95-595, at 128, *reprinted in* 1978 U.S.C.C.A.N 6089. Money obtained in that way would now be rendered nondischargeable by § 523(a)(2)(B), but no general denial of bankruptcy relief would be available. *Id.* Additionally, while Congress declined the suggestion of the Bankruptcy Commission to completely eliminate the exception to discharge for consumer debts resulting from the use of false financial statements, *id.* at 131, *reprinted in* 1978 U.S.C.C.A.N 6092; Commission Report, pt. 1, at 176, Congress enacted § 523(d), which awarded to the debtor his costs and attorney's fees in any action brought by the creditor in which the consumer debtor prevails, but denied the same relief to creditors when they prevail. Pub. L. No. 95-598 § 523(d), 92 Stat. 2592; H.R. Rep. No. 95-595, at 131, *reprinted in* 1978 U.S.C.C.A.N. 6092; S. Rep. No. 95-989, at 6, *reprinted in* 1978 U.S.C.C.A.N. 5792. *See* Pet. Br. at 30-31.

More directly, Congress sharply curtailed the use of reaffirmation agreements to narrowly defined statutory limits. Pub. L. No. 95-598, § 524(c)-(d), 92 Stat. 2592-93 (codified at 11 U.S.C. § 524(c)-(d)); H.R. Rep. No. 95-595, at 164, *reprinted in* 1978 U.S.C.C.A.N. 6125. It took this step with the perception that creditors had often been able to induce debtors to sign binding reaffirmation agreements, eliminating any beneficial effects of the bankruptcy, through threats to "damage the creditor's personal or credit reputation by letters to an employer"

or the threat of repossession of the debtor's household and personal goods. H.R. Rep. No. 95-595, at 163, *reprinted in* 1978 U.S.C.C.A.N. 6124.

Certainly, Congress's intentions as thus manifested in legislation in 1978 go to the protection of consumer debtors against institutional creditors thought prone to abuse any leverage provided them in the bankruptcy context. They lend no support to any suggested canon of construction that would read nondischarge provisions broadly, or to the view that persons found liable for fraud on the basis of reckless, unintentional conduct, should be denied discharge for related exemplary damage awards, no matter how large. Certainly, too, they are directly at odds with the supposed policy basis enunciated by the court below for its ruling — that unless treble damage awards are found nondischargeable, creditors will have difficulty obtaining competent legal representation. Pet. App. 13a; Pet. Br. at 29.

Nor, contrary to respondents' argument, Resp. Br. at 16, do the various enactments in 1984, making incremental modifications in the Code as enacted, amount to any sort of a congressional about face in this regard. While it is true that some of the provisions enacted in 1984 limited in some ways the procedural avenues and prerogatives available debtors in bankruptcy, other provisions strengthened the position of debtors in important ways.[19] Overall, it can fairly be said that Congress has had an abiding concern to ensure that the bankruptcy system offers

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[19] Changes made in 1984 to incrementally strengthen the position of debtors show that Congress was motivated by a desire to fine tune, not to roll back. In particular, Congress added language to the automatic stay provision of § 362 allowing debtors injured by violation of that provision to recover actual and punitive damages, costs and attorney's fees, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 304, 98 Stat. 352, and it added a new subsection to § 525 of the Code, prohibiting employment discrimination based on resort to the bankruptcy process, insolvency in connection therewith, or failure to pay a debt rendered dischargeable under the law. *Id.* § 309, 98 Stat. 355.

debtors burdened by consumer debt a real opportunity to start over. Reading § 523(a)(2) in accordance with its words would serve that purpose most effectively.

CONCLUSION

For all of the reasons set forth above and in petitioner's opening brief, the decision of the court below should be reversed.

Respectfully submitted,

HOWARD J. BASHMAN
JOHN FRANCIS GOUGH
MONTGOMERY, MCCRACKEN
WALKER & RHOADS, LLP
123 South Broad Street
Philadelphia, PA 19109
(215) 772-1500

DONALD B. AYER
(Counsel of Record)
JAMES E. ANKLAM
JONES, DAY, REAVIS & POGUE
1450 G Streeet, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioner

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